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No. 87-590

FILED
DEC 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

SEYMOUR SIFLINGER, PETITIONER

v.

ANN MCLAUGHLIN,
SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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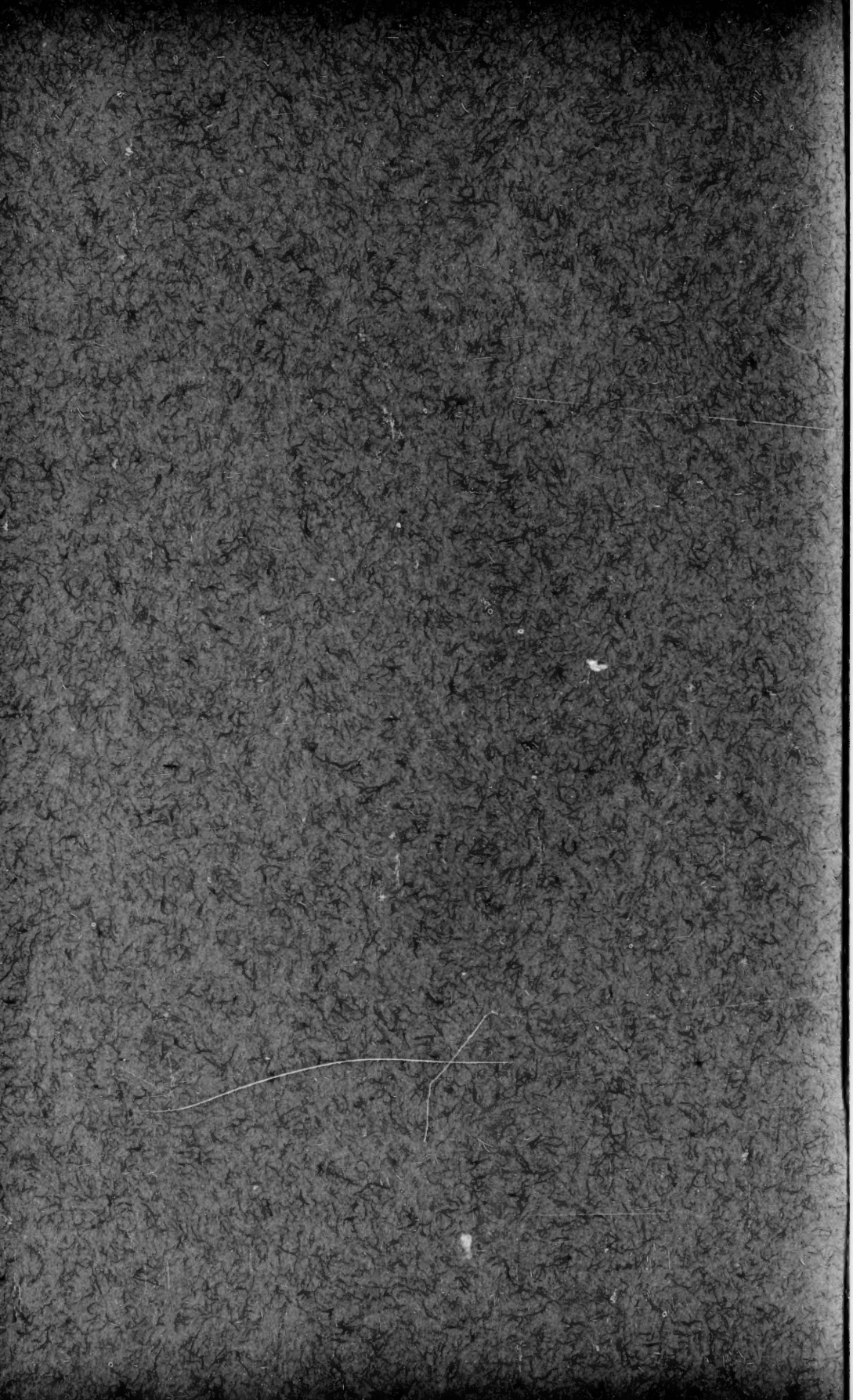

QUESTIONS PRESENTED

1. Whether petitioner, a fidicuary found liable under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. III) 1001 *et seq.*, for breaches of his obligations to an employee benefit plan established by a labor union, has standing to challenge ERISA's constitutionality on the ground that it exempts from coverage certain "church plans."

2. Whether the plan at issue, which was established for the purpose of providing medical benefits to union members, is an "employee benefit plan" under ERISA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unreported. The final judgment of the district court (Pet. App. 14-18) and the district court's findings of fact and conclusions of law are unreported.

JURISDICTION

The judgment of the court of appeals was entered May 14, 1987. A petition for rehearing was denied on July 7, 1987 (Pet. App. 6). The petition for writ of certiorari was filed on October 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. III) 1001 *et seq.*, is a comprehensive remedial statute designed to safeguard the interests of millions of workers participating in employee

benefit plans. Section 3 of ERISA defines those plans to which the Act's coverage extends. 29 U.S.C. 1002. Specifically included are medical benefit plans established or maintained by labor unions. 29 U.S.C. 1002(1) and (4). Exempted from coverage are a handful of plans, including certain "church plan[s]." 29 U.S.C. 1003(b)(2). The "church plan" exception encompasses only those church plans exempted from taxation under Section 501 of the Internal Revenue Code (26 U.S.C.), and does not extend to plans established for the benefit of individuals "employed [by the church] in connection with * * * unrelated trades or businesses." 29 U.S.C. 1002(33)(A) and (B)(i).

Petitioner was an officer of Local 227, an affiliate of the Office and Professional Employees International Union, from its inception in 1979 until September 1983. Petitioner was a member of the Plan Benefit Committee of the Consolidated Labor Union Trust (the Plan), the employee benefit plan established by Local 227 to provide medical benefits to union members. Petitioner was also the "state agent" for Executive Insurance Advisors (EIA), the firm initially retained by the Plan Benefit Committee as the Plan's administrative services provider. Findings of Fact and Conclusions of Law 2-6 [hereinafter Findings].[1] While Local 227 entered into collective bargaining agreements with eight firms in South Florida (*id.* at 2), it appears that marketing the Plan was Local 227's primary activity. In order to participate in the Plan, an individual had to join the union, but "Local 227 itself imposed no requirement on eligibility for membership other than that the individual reside within the state of Florida, be of a certain age and have some form of employment" (*id.* at 4). As state agent for EIA, petitioner supervised insurance agents

[1] We have lodged with the Clerk of the Court a copy of the district court's findings of fact and conclusions of law, which are not included in the appendix to the petition.

who recruited members and enrolled them in the Plan. The agents received a commission on each new member's premium, and petitioner received an override commission. Petitioner received $357,158 in commissions from 1980 through 1984 (*id.* at 10).

In 1986, the Secretary of Labor filed this action in the United States District Court for the Southern District of Florida, charging petitioner and eleven other defendants with numerous violations of ERISA, including breaches of their fiduciary obligations to the Plan. Prior to filing his answer, petitioner moved to dismiss the complaint, arguing that ERISA is unconstitutional because it exempts "church plans" from coverage (Pet. App. 7); the district court denied that motion (*id.* at 13). After trial,[2] the court found that the Plan is covered by ERISA. It noted that the parties had stipulated that the Plan is an employee benefit plan covered by ERISA, and rejected petitioner's "belated attempt to question the Plan's status under ERISA during oral argument at trial after plaintiff rested." Findings at 13. The court explained that "[a]lthough the evidence in the record suggests that the union was operated by its officers in violation of its own governing documents, primarily as a device to aid in the marketing of health benefits, dereliction of duty by the union[']s officers does not alter the purpose for which the union was constituted and chartered" (*id.* at 14). The district court also found that the Plan Benefit Committee selected EIA (which was owned by two Committee members (*id.* at 16)) as the Plan's administrative services provider and determined its rate of compensation without determining what other firms would charge for similar services (*id.* at 6), and that EIA was overcompensated for its services (*id.* at 16).

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[2] The claims against nine of the twelve defendants were settled prior to trial. The district court entered a default judgment against one remaining defendant and judgments of liability on the merits against petitioner and the final defendant (Pet. App. 15). Only petitioner appealed (*id.* at 1).

The district court concluded that petitioner had breached his fiduciary obligations to the Plan in three ways: first, as a member of the Plan Benefit Committee, he had selected, failed adequately to monitor, and approved payment of excessive administrative fees from Plan assets to EIA, in violation of Section 404(a)(1)(A) and (B) of ERISA, 29 U.S.C. 1104(a)(1)((A) and (B); second, as a member of the Plan Benefit Committee, he had authorized the use of Plan assets to pay commissions to insurance agents marketing the Plan, in violation of Section 404(a)(1)(A) of ERISA, 29 U.S.C. 1104(a)(1)(A); finally, he himself had received commissions from Plan assets, which constituted unlawful transfers of Plan assets to a party in interest, in violation of Section 406(a)(1)(C) and (D) of ERISA, 29 U.S.C. 1106(a)(1)(C) and (D). To redress these violations, the court enjoined petitioner from ever again serving as a fiduciary or provider of services to any ERISA-covered plan. It also ordered him individually to make restitution to the Plan of $319,751, and found him jointly liable for an additional $371,894. Pet. App. 15-17.

The court of appeals affirmed (Pet. App. 1-5). Declining "to issue an advisory opinion" on petitioner's constitutional claim, the court held that he lacked standing to challenge the constitutionality of ERISA's exemption of church plans (*id.* at 3). It also rejected petitioner's argument that the Plan is not covered by ERISA, stating that while petitioner's "argument that Local 227 was a sham union is, no doubt, in large part correct[,] [n]evertheless, Local 227 meets the minimum requirements necessary to qualify as an 'employee organization' " under ERISA (*id.* at 4-5).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner first contends (Pet. 6-10) that ERISA unconstitutionally exempts church plans from coverage. Petitioner states (*id.* at 9) that he is not challenging the church plan exemption under the Establishment Clause. Rather, he says (*id.* at 8), he is arguing on equal protection grounds that "the statute is invalid because it unreasonably classifies" church plans as exempt but does not exempt plans established by other charitable organizations from ERISA's coverage. In petitioner's view, this Court should remedy this alleged equal protection violation by extending the exemption to all organizations covered by Section 501 of the Internal Revenue Code. Since "labor unions" are among such organizations, and since the Plan at issue was established by a union, petitioner's liability for ERISA violations would thereby be extinguished.

There is no basis for petitioner's argument. As ERISA's legislative history shows, Congress was concerned that imposition of ERISA's requirements on church plans, coupled with the governmental monitoring required under the Act, might create unwarranted intrusions into "the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." S. Rep. 93-383, 93d Cong., 1st Sess. 81 (1973). It seems clear that this Court would uphold the exemption in a case challenging it under the Establishment Clause.[3] Congress's

[3] The "church plan" exemption is consistent with numerous cases in which this Court has condoned or required a similar balance to be struck between governmental regulation and religious organizations in order to avoid the type of excessive entanglement prohibited by the Establishment Clause. See, *e.g.*, *Corporation of the Presiding Bishop* v. *Amos*, No. 86-179 (June 24, 1987), slip op. 11 (exempting religious organizations from Title VII's prohibition against religious discrimination); *Aguilar* v. *Felton*, 473 U.S. 402, 409 (1985) (prohibiting use of public funds to provide instructional services in parochial schools in part because of the elaborate supervision required to assure church-state separation); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (reading

desire to avoid intrusion into church activities was a reasonable basis[4] for exempting church plans, and not other charitable organizations, from ERISA's coverage, so there is no equal protection violation.

In any event, as the court of appeals concluded, petitioner lacks standing to bring an equal protection challenge. To have standing, an individual must demonstrate a " ' "distinct and palpable injury". . . that is likely to be redressed if the requested relief is granted.' " *Valley Forge Christian College* v. *Americans United For Separation of Church & State Inc.*, 454 U.S. 464, 475 (1982)(citations omitted). That is, a litigant must demonstrate a "fairly traceable" link between the government conduct he challenges and the injury he has suffered. *Allen* v. *Wright*, 468 U.S. 737, 757 (1984). There is no such link here. Even if there were no reasonable basis for exempting church plans from ERISA's coverage, the appropriate remedy would be to strike down the church plan exemption, not, as petitioner suggests, to extend it to encompass other organizations. Congress plainly intended that most charitable organizations would be subject to ERISA's requirements, as it exempted only churches, and only under certain circumstances, from the statute's coverage. Thus, assuming arguendo the invalidity of the statute because there is no reasonable basis for distinguishing churches from other charitable organ-

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Federal Unemployment Tax Act (26 U.S.C. 3309(b)) to require exemption of church-operated schools from liability for payment of state unemployment taxes); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979) (construing National Labor Relations Act (29 U.S.C. (& Supp. III) 151 *et seq.*) to exclude coverage of teachers in church-operated schools); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 677 (1970) (rejecting challenges to state property tax exemption for churches).

[4] Petitioner appears to agree (see Pet. 8) that the reasonable basis standard is applicable. It plainly is, as no fundamental right or suspect classification is involved here. *Regan* v. *Taxation With Representation*, 461 U.S. 540, 547 (1983).

izations, it is fairly clear that Congress would conclude that all such organizations should be subject to ERISA, rather than that all should be exempt. It is, moreover, implausible to suggest that Congress would want to exempt labor union officials establishing employee benefit plans from the fiduciary obligations ERISA imposes, or that it could not reasonably cover them while exempting plans established by other Section 501 organizations. It therefore follows that plaintiff's alleged injury is not likely to be redressed should his equal protection argument prevail.

2. The courts below also properly concluded that the Plan at issue is covered by ERISA. Section 4(a)(2) of ERISA, 29 U.S.C. 1003(a)(2), specifies that coverage under the Act extends to any "employee benefit plan * * * established or maintained * * * by any employee organization." An "employee benefit plan" includes "any plan * * * established or maintained * * * for the purpose of providing for its participants * * * medical, surgical, or hospital care or benefits * * *." 29 U.S.C. 1002(1). An "employee organization" is defined as "any labor union or any organization of any kind * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment * * *." 29 U.S.C. 1002(4). The Plan at issue is plainly covered by ERISA, as it indisputably was established to provide medical benefits to members of Local 227, which is a labor union.

Petitioner renews (Pet. 11-12) his contention that Local 227 was a sham union, and not an "employee organization" within the meaning of ERISA. There is no merit to that shameless argument. Local 227 was an affiliate of an international union, and, while its officers apparently were more interested in making money for themselves than in traditional union activities, the record

shows that Local 227 entered into collective bargaining agreements with eight firms. Findings 2.[5] It thus appears to be a labor organization. The fact that Local 227's officers did not live up to its stated objectives should not remove the employee benefit plan it established from ERISA's coverage, and hence from the fiduciary obligations it imposes.

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[5] The Plan here is clearly distinguishable from the plan at issue in *Bell* v. *Employee Sec. Benefit Ass'n*, 437 F. Supp. 382 (D. Kan. 1977), the sole authority upon which petitioner relies (Pet. 11) in attempting to avoid coverage. There was no evidence there that the entrepreneurs selling insurance under the label "employee benefit plan" in *Bell* had taken any steps, such as affiliating with an international union or entering into collective bargaining agreements with employers, that are typical of labor organizations (although not prerequisite to status as a labor organization under ERISA). Thus, there was not even a sham union in that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—202 037/60164